UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAVIER ALVAREZ, Plaintiff, v. MICHAEL J. ASTRUE, Commissioner of Social Security, Defendant.	Case No. CV 08-4429 JC MEMORANDUM OPINION

I. SUMMARY

On July 10, 2008, plaintiff Javier Alvarez ("plaintiff") filed a Complaint seeking review of the Commissioner of Social Security's denial of plaintiff's applications for benefits. The parties have filed a consent to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties' cross motions for summary judgment, respectively ("Plaintiff's Motion") and ("Defendant's Motion"). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; July 14, 2008 Case Management Order ¶ 5.

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Based on the record as a whole and the applicable law, the decision of the Commissioner is AFFIRMED. The findings of the Administrative Law Judge ("ALJ") are supported by substantial evidence and are free from material error.[1]

II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION

On September 12, 2003, plaintiff filed an application for Disability Insurance Benefits. (Administrative Record ("AR") 60-62). On July 22, 2004, plaintiff filed an application for Supplemental Security Income benefits. (AR 13). Plaintiff asserted that he became disabled on February 20, 2003, due to a stress related mini stroke, headaches, and pain in his upper and lower back, shoulders, and knees. (AR 60, 91). The ALJ examined the medical record and heard testimony from plaintiff and a vocational expert on April 11, 2007. (AR 348-83).

On May 23, 2007, the ALJ determined that plaintiff was not disabled through the date of the decision. (AR 14-19). Specifically, the ALJ found: (1) plaintiff suffered from the following severe impairments: Arthritis of the shoulders and knees and degenerative disc disease of the spine (AR 17); (2) plaintiff's impairments, considered singly or in combination, did not meet or medically equal one of the listed impairments (AR 14, 17); (3) plaintiff could perform a significant range of light work[2] (AR 16, 17-18); (4) plaintiff could not perform his past relevant work (AR 14, 18); (5) plaintiff could perform jobs that

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[1]The harmless error rule applies to the review of administrative decisions regarding disability. See Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1196 (9th Cir. 2004) (applying harmless error standard); see also Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1054-56 (9th Cir. 2006) (discussing contours of application of harmless error standard in social security cases).

[2]The ALJ determined that plaintiff: (i) could lift and/or carry up to 20 pounds occasionally and up to 10 pounds frequently; (ii) could stand/walk up to six hours per day; (iii) could sit up to six hours per day; (iv) should perform no at or above shoulder level work; (v) should not perform forceful pushing/pulling; (vi) should not run, jump, crawl; and (vii) should not perform repetitive or prolonged kneeling/squatting/stair climbing. (AR 15, 17-18).

exist in significant numbers in the national economy (AR 14, 18); and (6) plaintiff's allegations regarding his limitations were not totally credible (AR 15, 17).

On May 28, 2008, the Appeals Council denied plaintiff's application for review. (AR 5-7).

III. APPLICABLE LEGAL STANDARDS

A. Sequential Evaluation Process

To qualify for disability benefits, a claimant must show that he is unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least twelve months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the work he previously performed and incapable of performing any other substantial gainful employment that exists in the national economy. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

In assessing whether a claimant is disabled, an ALJ is to follow a five-step sequential evaluation process:

(1) Is the claimant presently engaged in substantial gainful activity? If so, the claimant is not disabled. If not, proceed to step two.

(2) Is the claimant's alleged impairment sufficiently severe to limit his ability to work? If not, the claimant is not disabled. If so, proceed to step three.

(3) Does the claimant's impairment, or combination of impairments, meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so, the claimant is disabled. If not, proceed to step four.

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(4) Does the claimant possess the residual functional capacity to perform his past relevant work?[3] If so, the claimant is not disabled. If not, proceed to step five.

(5) Does the claimant's residual functional capacity, when considered with the claimant's age, education, and work experience, allow him to adjust to other work that exists in significant numbers in the national economy? If so, the claimant is not disabled. If not, the claimant is disabled.

Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920).

The claimant has the burden of proof at steps one through four, and the Commissioner has the burden of proof at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001) (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of proving disability).

B. Standard of Review

Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of benefits only if it is not supported by substantial evidence or if it is based on legal error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir. 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457 (9th Cir. 1995)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

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[3]Residual functional capacity is "what [one] can still do despite [ones] limitations" and represents an "assessment based upon all of the relevant evidence." 20 C.F.R. §§ 404.1545(a), 416.945(a).

To determine whether substantial evidence supports a finding, a court must "'consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion.'" Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming or reversing the ALJ's conclusion, a court may not substitute its judgment for that of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

IV. DISCUSSION

A. The ALJ Properly Evaluated the Medical Evidence

1. Pertinent Facts

a. Medical Opinion Evidence

On September 4, 2003, Dr. Andrew Hesseltine, a treating physician, noted that plaintiff experienced tenderness in the cervical and lumbar soft tissue, and decreased range of motion in the cervical and lumbar spine. (AR 190-91). Dr. Hesseltine expressly referred to MRI studies of the back and neck, a nerve conduction test and electrodiagnostic studies. (AR 187, 191). Dr. Hesseltine recommended no functional limitations. (AR 14, 185-92).

On August 15, 2004, Dr. Michael Luciano, a consultative examining orthopedist, conducted a complex orthopedic evaluation of plaintiff in connection with plaintiff's worker's compensation claim. (AR 307-41). Dr. Luciano examined plaintiff and plaintiff's medical records, and provided a detailed summary of the records, including multiple MRI studies conducted on June 13, 2003, July 11, 2003, and March 23, 2004, and an electrodiagnostic study conducted on December 19, 2003. (AR 307-41). Dr. Luciano noted that plaintiff displayed tenderness to palpation in both shoulders, both knees, and in the cervical and lumbar soft tissue, and had decreased range of motion in his shoulders, cervical spine and lumber spine, and slightly decreased range of motion in flexion, bilateral knees. (AR 335, 337). Dr. Luciano opined that, on a prophylactic basis,

plaintiff should be precluded from: "at or above shoulder level work and forceful pushing/pulling, . . . running, jumping, crawling, and repetitive or prolonged kneeling/squatting/stair climbing, . . . very prolonged upward/downward/sideways gazing utilizing the neck, . . . [and] very heavy lifting and repetitive bending/stooping." (AR 335-36).

On October 14, 2004, Dr. Laurence Meltzer, a state consultative examining orthopedist conducted a complete orthopedic evaluation of plaintiff. (AR 197-201). (AR 197). Dr. Meltzer examined plaintiff and reviewed the objective medical evidence, expressly referencing another doctor's summaries of multiple cervical and lumbar spine MRIs. (AR 197-201). Dr. Meltzer found that plaintiff had minimal objective signs of pathology. Dr. Meltzer noted that plaintiff had decreased range of motion in the cervical spine, minimal decreased range of motion of the lumbar spine due to mild degenerative cervical disc disease of the cervical and lumbar spine, and normal range of motion for upper and lower extremities. (AR 198-201). Dr. Meltzer opined that plaintiff had "no functional restrictions" in his upper extremities, but was otherwise limited as follows: (1) he could lift and carry 50 pounds occasionally and 25 pounds routinely; (2) he could sit, stand and walk for a total of 8 hours in an 8-hour workday with breaks every 2-3 hours; (3) he should not walk on uneven or irregular terrain; (4) he could frequently climb stairs but not ladders; and (5) he could occasionally stoop, kneel and crouch. AR 201).

b. The ALJ's Decision

In his May 23, 2007, decision, the ALJ summarized the medical opinions and evaluations regarding plaintiff's physical impairments provided by Dr. Hesseltine, Dr. Luciano, and Dr. Meltzer, and considered "all . . . evidence of record," which also included statements submitted by plaintiff and his wife, and testimony of plaintiff and the vocational expert at the administrative hearing. (AR 14-21). The ALJ referred to plaintiff's complaints of multiple joint pains and

noted that "[o]bjective medical cause for [plaintiff's] pain [was] established by" multiple MRIs, which the ALJ summarized.

As noted above, the ALJ determined that plaintiff had the residual functional capacity to perform a significant range of light work, *i.e.*, that plaintiff: (i) could lift and/or carry up to 20 pounds occasionally and up to 10 pounds frequently; (ii) could stand/walk up to six hours per day; (iii) could sit up to six hours per day; (iv) should perform no at or above shoulder level work; (v) should not perform forceful pushing/pulling; (vii) should not run, jump, crawl; and (viii) should not perform repetitive or prolonged kneeling/squatting/stair climbing. (AR 15, 17-18). The ALJ stated that his residual functional capacity determination was based on "the most restrictive elements of [plaintiff's] examining and treating doctors' residual functional capacity opinions." (AR 15).

2. Analysis

Plaintiff contends that the ALJ failed adequately to evaluate the medical evidence, and that, consequently, the ALJ's decision was not supported by substantial evidence. (Plaintiff's Motion at 5-6). Specifically, plaintiff alleges that the ALJ (1) inadequately addressed and/or misstated the results of MRI studies (Plaintiff's Motion at 2, 3-5); (2) inadequately discussed the opinions of Dr. Hesseltine (a treating physician who generated a report dated September 4, 2003 [AR 185-92]) and Dr. Luciano (a medical examiner who generated a report dated August 15, 2004 [AR 307-41]) (Plaintiff's Motion at 2); (3) made a residual functional capacity assessment that, contrary to the ALJ's suggestion, was not as restrictive as that called for by Dr. Meltzer (a state agency consultative examiner [AR 197-201]) (Plaintiff's Motion at 3); and (4) ignored the December 19, 2003 electrodiagnostic examination report from Dr. Leonard Scott (Plaintiff's Motion at 5). This Court concludes that the ALJ did not materially err in evaluating the record medical evidence.

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First, this Court rejects plaintiff's contentions that the ALJ's evaluation of the MRI studies warrants a reversal or remand. Plaintiff essentially complains that the ALJ's evaluation of the MRIs was erroneous because the ALJ's summary of such reports did not cite to the record and misstated the results of the MRIs of plaintiff's cervical and lumbar spines. (Plaintiff's Motion at 2-6). To the extent plaintiff complains about the ALJ's failure to cite to the record when discussing the MRIs, such omission is immaterial. To the extent plaintiff complains that the ALJ's summary of the MRIs was incomplete and misstated the findings therein, the Court likewise finds no material error, particularly when the ALJ's summary is viewed in context. As noted above, the ALJ summarized the MRIs for the purpose of making it clear that there was objective medical evidence of the cause of the pain about which plaintiff complained – a threshold determination necessary to an analysis of plaintiff's credibility, as discussed further below. (AR 14). It was unnecessary for the ALJ to recite and discuss every detail regarding the MRIs, particularly where, as here, the medical opinions to which the ALJ did specifically refer and upon which he relied – those of Drs. Hesseltine, Luciano and Metzger – did consider the MRIs in issue. As noted above, all three such doctors expressly referred to the MRIs, and Dr. Luciano, in particular, detailed the results of each of the MRIs referenced by plaintiff. (AR 187, 191, 197, 314, 315, 320-21). Plaintiff does not dispute that the three medical opinions that form the basis of the ALJ's residual functional capacity assessment are supported by substantial medical evidence. Simply because the ALJ did not himself discuss every MRI report and may not have accurately summarized them in the context of determining that there was objective evidence to support plaintiff's assertion that he suffered from pain, does not mean he failed to consider such evidence. See Black v. Apfel, 143 F.3d 383, 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that such evidence was not considered[.]"). The ALJ was not required to discuss every piece of evidence in the record. See Howard ex rel. Wolff v.

Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003) (citations omitted). In light of the medical doctors' expertise, it was wholly appropriate for the ALJ to rely on their assessments of the MRIs and the functional impact of such studies, as opposed to adopting plaintiff's currently asserted lay assessment of such reports. See Gonzalez Perez v. Secretary of Health & Human Services, 812 F.2d 747, 749 (1st Cir. 1987) (ALJ may not "substitute his own layman's opinion for the findings and opinion of a physician"); Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985) (ALJ may not substitute his interpretation of laboratory reports for that of a physician); Winters v. Barnhart, 2003 WL 22384784, at *6 (N.D. Cal. Oct.15, 2003) ("The ALJ is not allowed to use his own medical judgment in lieu of that of a medical expert.").

Second, this Court rejects plaintiff's contention that the brevity of the ALJ's reference to the opinions of Drs. Hesseltine and Luciano warrants a reversal or remand. The ALJ was not required to discuss at length medical opinion evidence which he did not reject, and which was cumulative. See Howard, 341 F.3d at 1012. Even assuming the ALJ erred in not more extensively discussing such doctors' opinions, such error was harmless as the ALJ's residual functional capacity assessment was at least as restrictive as recommended by such doctors. In any event, nether such doctor opined that plaintiff could not work for any twelve-month period. See Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993) (in upholding the Commissioner's decision, the Court emphasized: "None of the doctors who examined [claimant] expressed the opinion that he was totally disabled"); accord Curry v. Sullivan, 925 F.2d 1127, 1130 n.1 (9th Cir. 1990) (upholding Commissioner and noting that after surgery, no doctor suggested claimant was disabled).

Third, the Court likewise finds harmless any error by the ALJ in suggesting that he had adopted the "most restrictive elements" of the medical opinion evidence when determining plaintiff's residual functional capacity, even though

Dr. Meltzer said plaintiff should only "occasionally stoop, kneel and crouch" (AR 201), and the ALJ's residual functional capacity determination precluded only "repetitive or prolonged kneeling [or] squatting" (AR 15). (Plaintiff's Motion at 3). As defendant accurately points out, each of the jobs the vocational expert testified plaintiff could perform were at a light exertional level and required no more than occasional stooping, kneeling and crouching. (Defendant's Motion at 6) (citing Dictionary of Occupational Titles ("DOT") §§ 706.687-010 [bench assembler], 727.687-062 [inspector], 920.687-098 [handkerchief folder]).[4]

Finally, the ALJ was not required to explain his decision to exclude any findings contained in the electrodiagnostic examination report prepared by Dr. Leonard Scott. An ALJ must provide an explanation only when he rejects "significant probative evidence." See Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (citation omitted). Here, Dr. Scott found that plaintiff had marked sensory radiculopathy of the right sided (L5) peroneal nerve and left (S1) sided sural nerve. Plaintiff fails to demonstrate that such finding constitutes significant or probative evidence that is not already accounted for in the ALJ's residual functional capacity assessment. Moreover, at least Dr. Luciano expressly considered Dr. Scott's December 19, 2003 report in connection with reaching his opinions. (AR 307, 319). The ALJ considered Dr. Luciano's report when determining plaintiff's residual functional capacity, and thus ultimately did not fail to account for Dr. Scott's report. (AR 14-15).

In light of the foregoing, a remand or reversal on this basis is not warranted.

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[4]According to the DOT, the job of bench assembler calls for occasional stooping and crouching, but kneeling is not present, whereas neither stooping, kneeling, nor crouching are present in connection with the jobs of inspector and handkerchief folder. DOT §§ 706.687-010, 727.687-062, 920.687-098.

B. The ALJ Properly Evaluated Plaintiff's Credibility

1. Additional Pertinent Facts

In an Exertional Daily Activities Questionnaire dated October 13, 2003, plaintiff stated the following: He suffers from a lot of pain in his upper back, his lower back, his shoulders and his knees. He has headaches. He feels fatigued very easily. He doesn't walk, and when he does go to the store with his wife, he gets very tired. His wife cleans the home. He is only able to drive his car for 30 minutes a day. He requires rest periods during the day due to fatigue and strong headaches. (AR 136-38).

In a disability report received by the Social Security Administration on November 12, 2004, plaintiff stated that he has numbness and tingling in his arms, and is increasingly more uncomfortable while sitting, especially while driving. (AR 149).

In a disability report dated January 25, 2005, plaintiff stated: The pain in his back is so severe that he cannot bend over. His wife must help him dress every day. He is unable to help his wife much anymore with cooking or cleaning. He is unable to do lawn work for more than five minutes at a time. Bending over or leaning over slightly and holding weight causes extreme pain. (AR 146, 153).

At the April 11, 2007 hearing, plaintiff testified: He experiences pain in his neck, back and knees. (AR 367, 371). He continued to take Ibuprofen and Vicodin which helped a little with his pain, but caused plaintiff to feel drunk. (AR 368). He needs to rest every day, sometimes for several hours. (AR 371-72).

In the ALJ's May 23, 2007 decision, the ALJ noted that plaintiff's symptoms included pain in his shoulders, knees and back. (AR 14). The ALJ found that plaintiff's medically determinable impairments could reasonably be expected to produce his symptoms, but determined that plaintiff's subjective complaints were not "sufficiently credible to justify any further limitations than

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those established by the objective medical record." (AR 15). The ALJ stated two reasons for discrediting plaintiff's subjective complaints.

First, the ALJ noted that plaintiff's "allegations of total disability [were] inconsistent with his activities" as reflected in a Third Party Function Report submitted by plaintiff's wife. (AR 15). Specifically, the ALJ stated:

> The [plaintiff's] wife, Rosa Alvarez, states that [plaintiff] goes to church daily, visits his father at the hospital daily, reads the Bible daily, plays guitar daily, and does some household chores daily [citation]. He also does light yard work, talks on the phone, and hosts visitors. He can lift objects that weigh up to ten pounds without any problems, and can stand and walk for about ten minutes. He has good social skills [citation].

(AR 15) (citing Exhibit 6E [AR 120-28]). The ALJ noted that plaintiff's wife's statements were mostly credible, but that her estimate of the weight plaintiff could safely lift was not supported by any professional medical opinion. (AR 15).

Second, the ALJ pointed out that plaintiff's subjective complaints were "not consistent with the treatment he [was receiving]." (AR 15). Specifically, the ALJ noted that even though plaintiff alleged that he was in a disabling level of pain, "he treated his pain with physical therapy and one and a half years of chiropractic. He also takes ibuprofen and Tylenol [citation]." (AR 15 (citing AR 197)). The ALJ concluded that "[i]t [was] reasonable to assume that if [plaintiff] were as pained as he claimed, he would have told his doctor, and the doctor would have ordered more aggressive treatment." (AR 15).

2. Pertinent Law

An ALJ is not required to believe every allegation of disabling pain or other non-exertional impairment. Orn v. Astrue, 495 F.3d 625, 635 (9th Cir. 2007) (citing Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)). If the record establishes the existence of a medically determinable impairment that could reasonably give

rise to symptoms assertedly suffered by a claimant, an ALJ must make a finding as to the credibility of the claimant's statements about the symptoms and their functional effect. Robbins, 466 F.3d 880 at 883 (citations omitted). Where the record includes objective medical evidence that the claimant suffers from an impairment that could reasonably produce the symptoms of which the claimant complains, an adverse credibility finding must be based on clear and convincing reasons. Carmickle v. Commissioner, Social Security Administration, 533 F.3d 1155, 1160 (9th Cir. 2008) (citations omitted). The only time this standard does not apply is when there is affirmative evidence of malingering. Id. The ALJ's credibility findings "must be sufficiently specific to allow a reviewing court to conclude the ALJ rejected the claimant's testimony on permissible grounds and did not arbitrarily discredit the claimant's testimony." Moisa v. Barnhart, 367 F.3d 882, 885 (9th Cir. 2004).

To find the claimant not credible, an ALJ must rely either on reasons unrelated to the subjective testimony (*e.g.*, reputation for dishonesty), internal contradictions in the testimony, or conflicts between the claimant's testimony and the claimant's conduct (*e.g.*, daily activities, work record, unexplained or inadequately explained failure to seek treatment or to follow prescribed course of treatment). Orn, 495 F.3d at 636; Robbins, 466 F.3d at 883; Burch, 400 F.3d at 680-81; SSR 96-7p. Although an ALJ may not disregard such claimant's testimony solely because it is not substantiated affirmatively by objective medical evidence, the lack of medical evidence is a factor that the ALJ can consider in his credibility assessment. Burch, 400 F.3d at 681.

Questions of credibility and resolutions of conflicts in the testimony are functions solely of the Commissioner. Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006). If the ALJ's interpretation of the claimant's testimony is reasonable and is supported by substantial evidence, it is not the court's role to "second-guess" it. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

3. Analysis

Plaintiff contends that the ALJ improperly evaluated his credibility. As noted above, the ALJ stated two reasons for discrediting plaintiff's allegations regarding the severity of his pain. (AR 15). The Court concludes that each such reason individually constitutes a clear and convincing reason for rejecting plaintiff's pain testimony, and that each such reason is supported by substantial evidence. Accordingly, a reversal or remand based upon the ALJ's assessment of plaintiff's credibility is not warranted.

First, this Court rejects plaintiff's suggestion that the ALJ's credibility determination failed sufficiently to address plaintiff's subjective statements regarding pain and his asserted inability to perform tasks on a sustained basis. The ALJ expressly acknowledged that plaintiff complained of "disabling . . . pain" and, again, that such pain could reasonably result from plaintiff's medically determinable impairments. (AR 14). As noted above, the ALJ was not required to discuss every piece of cumulative evidence regarding plaintiff's pain. See Howard, 341 F.3d at 1012; Black, 143 F.3d at 386.

Second, the ALJ properly discredited plaintiff's allegations of disabling pain as inconsistent with plaintiff's daily activities. See Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002) (inconsistency between the claimant's testimony and the claimant's conduct supported rejection of the claimant's credibility); Verduzco v. Apfel,188 F.3d 1087, 1090 (9th Cir. 1999) (inconsistencies between claimant's testimony and actions cited as a clear and convincing reason for rejecting the claimant's testimony). The ALJ reasonably concluded that a person who was unable to perform even sedentary work would not have been able to sustain the daily schedule maintained by plaintiff, as reflected in his wife's Function Report. (AR 15, 120-24). Although plaintiff suggests that the activities identified in plaintiff's wife's Function Report were simply examples of activities that plaintiff performed on a daily basis (Plaintiff's Motion at 8-9), it was

reasonable for the ALJ to infer otherwise. The Function Report instructs the person completing the form to state what the claimant "does from the time he [] wakes up until going to bed." (AR 120). The ALJ reasonably inferred that the wife's response to such question reflected plaintiff's *daily* activities. Moreover, plaintiff testified at the hearing that during a typical day he would take his daughter to school in the morning, stop at church "every day," and play his guitar "every day." (AR 375-76). Plaintiff also stated that he read the Bible "a lot," watched television, listened to music, helped with household chores and did light yard work. (AR 375-77). This Court will not second-guess the ALJ's reasonable interpretation of such evidence, even if such evidence could give rise to inferences more favorable to plaintiff.[5]

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[5]Plaintiff also suggests that the ALJ's credibility assessment of plaintiff is flawed because the ALJ did not expressly reference or discredit other statements of plaintiff's wife which corroborate plaintiff. (Plaintiff's Motion at 8-9). This Court disagrees. Lay testimony as to a claimant's symptoms is competent evidence that an ALJ must take into account, unless he expressly determines to disregard such testimony and gives reasons germane to each witness for doing so. Stout, 454 F.3d at 1056 (citations omitted); Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). Here, the ALJ satisfied his obligations in this regard. To the extent the ALJ erroneously failed to discuss plaintiff's wife's statement that plaintiff spends "all day" with her and that she is "always helping [plaintiff]" (Plaintiff's Motion at 8), any error was harmless as the ALJ expressly noted in his decision that he had considered the lay evidence from plaintiff's wife and because such evidence was cumulative of plaintiff's own statements. See Zerba v. Commissioner of Social Security Administration, 279 Fed. Appx. 438, 440 (9th Cir. 2008) (failure to address husband's cumulative lay testimony harmless error); Rohrer v. Astrue, 279 Fed. Appx. 437, 437 (9th Cir. 2008) (rejecting claimant's contention that ALJ improperly rejected lay witness statement of claimant's girlfriend where such statement cumulative of statements by claimant which ALJ accepted). (The Court may cite unpublished Ninth Circuit opinions issued on or after January 1, 2007. See U.S. Ct. App. 9th Cir. Rule 36-3(b); Fed. R. App. P. 32.1(a)). To the extent plaintiff alleges that the ALJ erroneously "ignored" the statement that plaintiff is unable to walk more than 10 minutes at a time (Plaintiff's Motion at 9), any such error was also harmless as such statement was cumulative of plaintiff's own statements and as the ALJ noted with respect to the wife's other statements about plaintiff's exertional abilities, that such lay statement was "not supported by any professional medical opinion" in the record, and therefore was reasonably rejected without comment. See Vincent, 739 F.2d at 1394-95 (ALJ did not err by omitting from hearing decision discussion of "lay testimony that conflicted with

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Third, the ALJ reasonably rejected plaintiff's allegations of disabling pain as inconsistent with the level of treatment he received. The ALJ noted that plaintiff had treated his pain with physical and therapy and chiropractic and was taking relatively mild pain relievers (Tylenol) and non-prescription medication (Ibuprofen). (AR 15). It was reasonable for the ALJ to infer that if plaintiff's pain was incapacitating, he would requested and been prescribed stronger medication and more aggressive treatment. In assessing credibility, the ALJ may properly rely on plaintiff's unexplained failure to request treatment consistent with the alleged severity of her symptoms. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991) (en banc); Meanel v. Apfel, 172 F.3d 1111, 1114 (9th Cir. 1999); see Tidwell v. Apfel, 161 F.3d 599, 602 (9th Cir. 1999) (lack of treatment and reliance upon nonprescription pain medication "clear and convincing reasons for partially rejecting [claimant's] pain testimony").[6]

As the ALJ made specific findings stating clear and convincing reasons supported by substantial evidence for discrediting plaintiff's allegations regarding

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[5](...continued)
the available medical evidence.") (citation omitted). As the ALJ expressly considered and partially rejected plaintiff's wife's statements based upon germane reasons which are supported by the record, the ALJ did not err in evaluating such lay testimony.

[6]Although plaintiff, at the April 11, 2007 hearing, testified that he also took Vicodin, a stronger medication, which helped with the pain, but caused him to feel "drunk" and weak (AR 367-70), plaintiff's medical records do not reflect that for any period plaintiff was prescribed Vicodin he complained that he suffered from any side effects from the medication, or that the medication was ineffective in alleviating plaintiff's pain. (AR 289, 291-94, 299). The ALJ could reasonably have concluded that plaintiff's medication sufficiently resolved his pain complaints, and that plaintiff's testimony regarding any medication side effects was not credible. This Court may not substitute its own judgment on credibility for that of the ALJ. Similarly, even though Dr. Hesseltine recommended that plaintiff receive "an injection for relief of pain" (AR 138), plaintiff points to no evidence that he ultimately received such treatment, or if he did, that it was ineffective in alleviating his pain. (AR 191).

the severity of his pain, the ALJ's credibility determination does not warrant a reversal or remand.[7]

V. CONCLUSION

For the foregoing reasons, the decision of the Commissioner of Social Security is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 28, 2009

/s/
Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

[7]Even if one of the bases upon which the ALJ discredited plaintiff's pain testimony was deficient, any such error was harmless because the remaining reason noted by the ALJ is supported by substantial evidence and the foregoing error does not negate the validity of the ALJ's ultimate credibility conclusion in this case. See Carmickle, 533 F.3d at 1162 (Where some reasons supporting an ALJ's credibility analysis are found invalid, the error is harmless if (1) the remaining reasons provide substantial evidence to support the ALJ's credibility conclusions, and (2) "the error does not negate the validity of the ALJ's ultimate credibility conclusion.") (quoting Batson, 359 F.3d at 1195) (citation and internal quotation marks omitted).